Supreme Court, U.S.
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No. 82-1021

In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

DIVISION OF MILITARY AND NAVAL AFFAIRS, STATE OF NEW YORK, AND DEPARTMENT OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

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Petitioner contends that Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. V) 7131(a), requires that a federal agency pay a per diem allowance and travel expenses to employee union representatives engaged in collective bargaining with the agency.

The New York National Guard is a state militia that is federally administered by the National Guard Bureau of the Department of Defense. See 10 U.S.C. 3015. National Guard technicians are employed to meet the day-to-day administrative, training, and logistical needs of the Guard (Pet. App. 3a). Under the National Guard Technicians Act of 1968, 32 U.S.C. (& Supp. V) 709, Guard technicians were converted to the status of federal civilian employees of the Department of Defense, although administration of the Guard program was retained by the various state adjutants general.

On two occasions, in November 1979 and April 1980, five National Guard technicians traveled to Albany, New York, from other locations in the State to participate as union negotiators in collective bargaining with respondent New York National Guard, also known as the Division of Military and Naval Affairs. The Guard granted these employees time off from their usual duties, but denied a request that it pay the employees' travel expenses and per diem (Pet. App. 3a). The New York State Council of Association of Civilian Technicians, Inc., the union that the employees represented, filed an unfair labor practice charge with petitioner, the Federal Labor Relations Authority. Petitioner determined (*id.* at 17a-21a) that the Guard had committed an unfair labor practice and ordered it to pay the disputed expenses. Petitioner based its order on its belief that the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. V) 7131(a), requires a federal agency to pay travel expenses and per diem allowances to employee union representatives engaged in collective bargaining with the agency.

On petition for review of that decision, the court of appeals concluded (Pet. App. 1a-7a) that deference to petitioner's interpretation of the statute was inappropriate and that petitioner had interpreted Section 7131(a) incorrectly. Therefore, the court refused to enforce petitioner's order. The court of appeals noted (Pet. App. 5a n.3) that its decision was in direct conflict with the decision of the Ninth Circuit in *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 672 F.2d 732 (1982), cert. granted, No. 82-799 (Jan. 17, 1983).

In *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, *supra*, the FLRA ordered the BATF to pay travel expenses and a per diem allowance to an employee union representative who had engaged in collective bargaining with BATF. The Ninth Circuit enforced that order, holding that the

FLRA's interpretation of the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. V) 7131(a), is correct. Thus, *Bureau of Alcohol, Tobacco and Firearms* presents the same issue that is raised in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be held and disposed of in light of the decision in *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, No. 82-799.[1]

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JANUARY 1983

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[1]Petitioner also has filed a petition for a writ of certiorari in another case in which the Eighth Circuit refused to enforce petitioner's order that a federal agency pay travel expenses and per diem of employee union representatives. *United States Department of Agriculture* v. *FLRA*, 691 F.2d 1242 (1982), petition for cert. pending, No. 82-979 (filed Dec. 13, 1982). We recently asked the Court to hold the petition in No. 82-979 for disposition in light of the decision in *Bureau of Alcohol, Tobacco and Firearms*, v. *FLRA*, No. 82-799.